

CC 97-165

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Petition for Commission Assumption)
of Jurisdiction of Low Tech Designs, Inc.'s)
Petition for Arbitration with GTE South Before the)
Public Service Commission of South Carolina)

PETITION FOR COMMISSION ASSUMPTION OF JURISDICTION

Low Tech Designs, Inc. ("LTD") submits this petition for Commission assumption of jurisdiction of arbitration pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 ("the Act"). LTD contends that the Public Service Commission of South Carolina ("PSCSC") has failed to fulfill its duty to arbitrate failed negotiations between LTD and GTE South ("GTE") under Section 252(b) of the Act. LTD therefore seeks FCC assumption of PSCSC jurisdiction of the arbitration between LTD and GTE.

STANDING AND BACKGROUND

1. LTD is a new entrant requesting telecommunications carrier attempting to enter the local telecommunications services market. LTD has stated its intention, to all parties, to offer resold local exchange services and new telecommunication services using unbundled network elements. LTD considers itself to be a telecommunications carrier as defined and anticipated by Sections 3(49) and 252(a)(1) of the Act respectively, and applicable FCC rules and interpretations.

2. After the passage of the Telecommunications Act of 1996, LTD filed for certification by the PSCSC in March of 1996, but had its application returned for a lack of sufficient information. Since the information required included "copies of proposed tariffs", which LTD was not prepared to provide at that time, LTD did not immediately refile its application.

3. After the August 8, 1996 release of the FCC's "First Report and Order" (FCC 96-325) implementing the local competition provisions of the Act, LTD became aware of the duty of incumbent LEC's (ILEC's) to negotiate in good faith, under Sections 251(b) and (c) of the Act, with a requesting telecommunications carrier, prior to the carrier first obtaining state certifications (see 47 CFR 51.301(c)(5)). LTD viewed this ILEC duty as supporting LTD's legal basis for entering into negotiations with GTE under the Act. In the opinion of LTD, this duty also provided a cornerstone of LTD's legal basis for obtaining arbitration of failed negotiations before State Commissions, if necessary, prior to obtaining State certification.

4. LTD initiated formal negotiations with GTE on August 12, 1996. GTE acknowledged LTD's request on August 19, 1996, stating it was ready to begin interconnection negotiations with LTD in South Carolina. At the time it initiated negotiations with GTE, LTD was a new entrant telecommunications carrier not certificated in South Carolina.

5. In a conversation with PSCSC executive staff after the August 8, 1996 release of the FCC's First Report and Order, LTD was advised that the PSCSC would not adopt the FCC's 17 to 25 percent proxy discount rates for resold ILEC retail services. Based on this information, LTD decided to delay refilling its certification application for the purposes of immediately offering resold telecommunications services, since GTE was only proposing an approximate 10 percent wholesale discount. LTD decided to concentrate on its unbundled network element negotiations with GTE and other ILEC's, anticipating that the major IXC's would press for higher wholesale discount percentages in their negotiations and arbitrations with GTE.

6. On or about January 17, 1997, after unproductive negotiations with GTE characterized by their general failure to negotiate in good faith, LTD filed a timely "Petition for Arbitration" ("Petition") with the PSCSC. The case was assigned Docket

No. 97-052-C. LTD was aware of a provision of South Carolina law, passed in May of 1996 (S.C. Code Ann. Section 58-9-10(13) (Supp. 1996)), that defined a "new entrant LEC" as "a telecommunications company holding a certificate of public convenience and necessity issued by the Commission pursuant to Section 58-9-280(B) after December 31, 1995, to provide local exchange service within a certificated geographic service area of the State". In its Petition, LTD admitted that it was not certificated in the State of South Carolina, and asked for relief, for arbitration purposes, from the previously quoted S.C law requiring certification for new entrant LEC's.

7. On March 4, 1997, the PSCSC issued an "Order Denying Petition" ("Order" (Order No. 97-153)), citing LTD's acknowledged lack of state certification as justification for refusing to arbitrate. The PSCSC also noted that no other "uncertified" company had petitioned the Commission for arbitration. They also claimed support of their Order by quoting Section 253(b) of the Act (State Regulatory Authority).

ARGUMENT

8. LTD has always maintained that entities entitled to negotiate with incumbent LEC's under the Act should have the right to arbitrate with the incumbent LEC if negotiations were not fruitful¹. LTD has also viewed negotiations and arbitration as separate from state commission certification, which is properly required in order to actually obtain authority to offer telecommunications services. In the local competition rules implementing the Act, the FCC agreed with this interpretation when it removed

¹ See, in this order, Paras. 12, 32, 1402, 1401, 341, and 1336 of the FCC's "First Report and Order" (FCC 96-325) released August 8, 1996, for a logical analysis of the entry path, from negotiation to arbitration, for small new entrant telecommunications carriers. Also, see "Joint Explanatory State of the Committee on Conference", H.R. Rep. No. 458, 104th Cong., 2d Sess., Jan. 31, 1996, where, in discussing Section 251, it states "The conferees note that the duties imposed under new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network". Congress clearly considered requests from existing telecommunications carriers and any other person to be equivalent for purposes of Section 251(b) duties, and also by reference in the Act, ILEC duties under Section 251(c).

state certification as a preliminary requirement for good faith negotiations between requesting telecommunications carriers and incumbent LEC's.

9. Since arbitrations under the Act are a legal consequence of a failure to obtain an interconnection agreement under voluntary negotiations, LTD believes that any state rules or rulings denying arbitration to a new entrant that has been in negotiations with an ILEC are in violation of Section 253(a) of the Act. Without an arbitrated agreement, a new entrant, such as LTD, is not able to take one of the first necessary steps towards offering its intended services. This has the effect of prohibiting "any entity", such as an uncertificated new entrant telecommunications carrier, the ability to offer telecommunications services, in violation of Section 253(a) of the Act.

10. Section 253(b) of the Act also requires States to impose their regulatory authority and requirements on a competitively neutral basis. In LTD's "Answer to GTE South's Return and Response in Opposition to Petition for Arbitration", in PSCSC Docket No. 97-052-C, LTD accused the PSCSC of approving agreements between BellSouth Telecommunications Inc. and new entrant telecommunications companies, without the new entrant companies first being certificated by the PSCSC². The PSCSC never challenged this assertion by LTD in their Order.

By approving agreements between an incumbent LEC and uncertificated entities, but refusing to arbitrate a failed agreement between an incumbent LEC and an uncertificated entity (LTD), the PSCSC violates the "competitively neutral basis" requirement of Section 253(b) of the Act that they quote in defense of their actions. In

² This "parading of agreements" practice of ILEC's has been found by LTD to be pervasive in other States and an attempt by ILEC's to increase their agreement "head count" with potential competitors in each jurisdiction. This tactic, involving the submission for approval of interconnection or resale agreements with entities in all ILEC jurisdictions, when the entity only plans on offering service in a single or limited number of States, causes the States that go along with this scheme to become unwitting accomplices to ILEC competitive tricks and illusions.

fact, these actions by the PSCSC favor ILEC's, to the extent it allows them to exaggerate their "opening of their networks" to competition.

11. There are also good business reasons why LTD, and other small new entrant telecommunications carriers, would not want to, and should not be required to, obtain state certification before arbitrations are held. In the real world, a business would typically never obtain licenses to operate a business prior to the business plan being complete, unless forced to do so or for other business reasons³. Legal and other related expenses for obtaining certification can be significant, especially for small entities. Until LTD is able to arbitrate to obtain the unbundled network elements and rates needed, it cannot with certainty say that it actually has a complete and viable business plan and will be able to offer a complete range of telecommunications services in a particular State. This may not be to the liking of the State Commissions that are called upon to arbitrate, but it is a fact of business life for new entrants.

Additionally, since a business plan cannot be completed prior to obtaining the needed network elements and associated ILEC rates, necessary capital may be unavailable until an arbitration is complete. This is certainly true in the case of LTD, which has potential investors waiting for its success in State arbitration. Since most jurisdictions expect new entrants to show substantial technical, managerial and financial capabilities, small companies with limited initial capital, still in a negotiations cycle with ILEC's, could be viewed as insufficiently capitalized to obtain certification. This could particularly be true if new entrants were relying upon the use of unbundled network elements for the provisioning of services, as is the case with LTD.

³ LTD originally filed for PSCSC certification in anticipation of significant wholesale discount percentages for resold ILEC services, with a corresponding significant business opportunity. When it became apparent that these discounts would not be ordered by the PSCSC, LTD's business plans changed, and the need for quick certification and resale market entry was no longer a business imperative.

CONCLUSION AND PRAYER

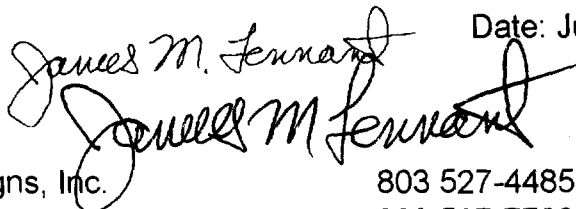
12. LTD respectfully requests that this Commission assume jurisdiction of the arbitration between LTD and GTE, as authorized in Section 252(e)(5) of the Act, since the PSCSC has failed to arbitrate differences between the parties as required as part of their Section 252 responsibilities under the Act.

LTD's initial new telecommunications service proposes to utilize unbundled network elements associated with call related databases for the purposes of providing a least cost routing service for long distance calls, available without presubscription and accessed by using an abbreviated dialing code. This proposed service, while extremely consumer friendly, has been and will be violently opposed by both ILEC's seeking entry into the long distance market and existing long distance carriers. LTD has already seen what it considers to be a failure to negotiate in good faith on the behalf of ILEC's, and a general tendency to mis-characterize the nature of the service to block LTD's ability to offer it to consumers.

LTD believes that FCC assumption of the arbitration will facilitate the introduction of this old - but new to residential and small businesses - telecommunications service, with favorable implications on long distance rates paid by these consumers. Additionally, it is LTD's desire to see this arbitration combined with other arbitrations denied to LTD by State Commissions in Georgia and Illinois with BellSouth and Ameritech respectively. These assumption petitions have been filed separately for Commission consideration.

Respectfully submitted,

James M. Tennant
President - Low Tech Designs, Inc.
1204 Saville St.
Georgetown, SC 29440



Date: July 9, 1997

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State South Carolina **Affidavit**
County Georgetown

I hereby certify that Mr. James M. Tennant, President of Low Tech Designs, Inc.,
1204 Saville St., Georgetown, SC, 29440, appeared before me, this 9th day of
July, 1997, and attested to the validity and true account of the attached PETITION
FOR COMMISSION ASSUMPTION OF JURISDICTION.

Mr. Tennant has affirmed to me that he is the author of the attached document
and that the facts contained within are true and based on verifiable records of the
negotiations and subsequent legal actions of Low Tech Designs, Inc., GTE South and
the Public Service Commission of South Carolina.

Notary Public:

Jane M. Green
Com. exp 3-24-98

Attest:

James M. Tennant
James M. Tennant

Date:

7/9/97

CERTIFICATE
OF SERVICE

I hereby certify that I have this day served one copy of the foregoing PETITION FOR COMMISSION ASSUMPTION OF JURISDICTION, by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following parties:

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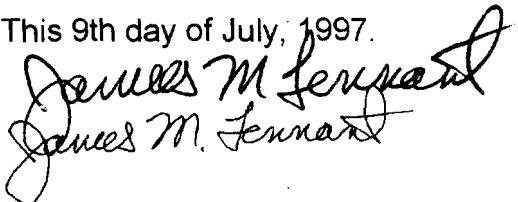
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An original and four copies were delivered, in the same manner, to:

William Caton
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This 9th day of July, 1997.



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